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IN THE

Supreme Court of the United States

October Term, 1982

No. 653

LAVERE REDFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING.

Jurisdictional Statement.

This is a Petition for Rehearing upon the order of this Court denying the Petition for Writ of Certiorari dated February 26, 1962.

On March 15, 1962, the time for filing this Petition for Rehearing was extended to and including April 6, 1962 by order of W. O. Douglas, Associate Justice of this Court.

Grounds for Rehearing.

The grounds for this Petition for Rehearing are that other substantial errors occurred at the time of trial, denying petitioner due process of law; and these errors were not presented previously as grounds for the Petition for Writ of Certiorari, to wit:

A. *The petitioner was denied due process of law in that he was erroneously indicated, convicted and sentenced on multiple offenses for each taxable year where only one offense is denounced by statute; and in connection with this:*

1. The jury was erroneously instructed that each count in the indictment constituted a separate offense; and as to the elements of the offense.

2. Counts V, VI and VII of the indictment upon which petitioner was convicted charged, if anything, an entirely different offense than designated.

3. The entire judgment and sentence based on the erroneous verdict and charges in the indictment is excessive and erroneous.

B. The petitioner was denied due process of law by the supplemental and coercive charge to the jury given after the jury's retirement for deliberation.

Preface to Argument.

In presenting the original Petition for Writ of Certiorari to this Court, it was petitioner's belief that the violation of petitioner's privilege against self-incrimination was so flagrant and outstanding, (see *Stewart v. United States*, ... U. S. ....., 81 S. Ct. 941, where a third murder conviction was reversed for this reason alone), that to encumber the record further except to present a new and novel point to the Court regarding the right to counsel would be to gild the lily.

Petitioner's evident need for counsel, and denial thereof, (and thus due process of law) is further illustrated in the points raised in this Petition for Rehearing and emphasized in the decision of this Court handed down in *Chewning v. Cunningham* (decided Feb. 19, 1962), ... U. S. ....., 82 S. Ct. 498, where in passing on a recidivist's need for counsel, Justice Douglas *per curiam* stated at page 500:

> ". . . It is 'the nature of the charge' (Citation) that underlines the need for counsel. In trials of this kind the labrynth of the law is, or may be, to intricate for the layman to master. (Citations).
>
> ". . . We only conclude that a trial on a charge of being a habitual criminal is such a serious one (Citation), the issues presented under Virginia's statute so complex, and the potential resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally applicable here."

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING.

A. The Erroneous Indictment, Conviction and Sentence.

Petitioner resided in a community property state and, as is set forth in respondent's brief (pp. 2-4), he and his wife filed separate returns splitting the income for the taxable years 1953, 1954, 1955 and 1956. An indictment was returned, charging petitioner with eight offenses under Section 145(B) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.[1]

The question presented here has never been passed on before as far as research can determine: That the reporting of a single community income by separate returns of husband and wife constitute *one* offense in any taxable year where the husband prepares the returns as manager of the community (and assuming that the other elements of the denounced acts are present).

Section 7201 (whenever Sec. 7201 is mentioned, it is intended to include Sec. 145(B)) is an "attempt" statute. All that is necessary to complete the crime denounced is a tax evasion motive and some affirmative conduct toward this end.

Spies v. United States (1943), 317 U. S. 492, 63 S. Ct. 364.

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[1]As applied herein, Section 7201 is a repetition of the latter portion of old Section 145(b) except as indicated by the brackets:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title [chapter] or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under Internal Revenue Code Sections 1 and 6012, a taxpayer must report his full income in a tax return at a specified time. The taxpayer's obligation is thus measured by what is done or not done at the time the law says it must be done. This is a single obligation, and to insure against any wilful violation, the word "attempt" was used by Congress. "Thus the wilful failure to report all of taxpayer's earned income in the twelve-month period and to pay the full and correct tax due for that twelve-month period was to be punished as an attempt to evade the amount of tax due for that twelve-month period."

> Kostelanetz and Bender, 1957, *The Criminal Aspects of Tax Fraud*, p. 9 (Continuing Education of the Bar, the American Law Institute collaborating with the American Bar Association)

Section 7201 outlaws the willful attempt to evade a tax, and not simply the conduct employed to affect the attempt to evade. There are numerous ways in which evasion can be had such as reported sales, padding of purchases, fictitious bank accounts, false tax returns, all engaged in with a tax evasion motive. However, each of the methods is only evidence by which the *attempt* to evade is proved.

Spies v. United States, supra.

But each such method could not itself constitute an attempt to evade the statute as it defines the crime. A contrary interpretation would result in as many counts

or indictments of separate "attempts" in one taxable year based on as many multiple devices were employed, which is ridiculous.

See:

United States v. Beacon Brass, 344 U. S. 43, ... S. Ct. ..... (1952).

In effect equating each method of evasion as evidence of the "attempt" contemplated by Section 720.

A husband and wife, in a community property state, have the right to divide marital income. Because the husband is the head and manager of the community, a return by him alone is substantial compliance with the law, and the mere fact that his wife does not join with him in the making of the return does not affect the validity of the tax or assessment based on his return.

United States v. Pettigrew (1936), 81 F. 2d 666;

Binder v. Welsh (1939), 107 F. 2d 812;

Fee v. Arizona State Tax Commission (1940), 98 P. 2d 467.

Under the holding of *Spies, supra*, an overt act is required to complete the offense. But it is the intent or tax evasion motive which is important. In a community property situation, then, the husband can have only one intent to evade one tax.

The conduct prohibited under the statute involved is purely statutory and has no counterpart at the common law.

United States v. Miro (2d Cir. 1932), 60 F. 2d 58.

Of course, where penal statutes are involved, they must be strictly construed, and all reasonable doubt as to their meaning resolved in favor of the accused.

United States v. Reese, 92 U. S. 214, ... S. Ct. .....;

Jerome v. United States, 318 U. S. 101, ... S. Ct. .....;

Fasulo v. United States, 272 U. S. 620, ... S. Ct. .....

The instant case involves more than merely an excessive sentence since the "excess" is not separable from the residue and cannot be reached without disturbing the "legal" portion.

McKinney v. Finletter (..... Cir. 1953), 205 F. 2d 761;

Biddle v. Thiele (..... Cir. 1926), 11 F. 2d 235.

Although it is true that the jury brought in a verdict of "guilty" as to all counts of the indictment, the fact remains that Counts V, VI and VII involving the returns of petitioner's wife actually stated an offense under Section 7207 of the Internal Revenue Code of 1954.[2]

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[2]Section 7207 reads as follows:

"Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both."

In applying the rule of strict construction to penal statutes, it is seriously contended that the "not more" provision of Section 7207 places a restriction on Section 7201 where the prosecution relies on the income tax return as being false or fraudulent.

Thus, the Grand Jury indictment returning a "true bill" was not in fact a true bill. The petit jury, at the time of trial, was instructed that Counts V, VI and VII constituted separate offenses.[3] The fact that the jury was never instructed as to Section 7207 and that the evidence itself could apply equally to this lesser offense certainly materially infected the whole trial and all the Counts. (Especially with reference to the "Allen charge" given and discussed *infra.*)

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[3]Volume XI, page 2038, line 16—page 2039, line 15.

"The defendant, La Vere Redfield, is charged with four separate attempts to evade and defeat the taxes of himself for each of the years 1953, 1954, 1955 and 1956.

"He is also charged with four separate attempts to evade and defeat the taxes of his wife, Nell J. Redfield, for each of the years 1953, 1954, 1955 and 1956. The statute is so framed as to make liable any person who attempts willfully and unlawfully to evade the tax of himself or of any other person, whether or not the evasion of the other person is with the knowledge of such other person.

"You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade for a different year. It is also a separate offense to evade and defeat the taxes of one's wife in each year. The indictment in this case, therefore, charges eight separate offenses, the first four offenses being attempts on the part of LaVere Redfield to evade his own taxes for each of the years 1953, 1954, 1955 and 1956, and the other four offenses being attempts on the part of LaVere Redfield to evade the taxes of his wife for each of the years 1953, 1954, 1955 and 1956. You may find the defendant guilty or not guilty on any or all counts."

Again at page 2102, the Court stated (line 6):

". . . In this case the verdict is either guilty or not guilty on eight counts. . . ."

In *Berra v. U. S.* (Mo. 1956), 76 S. Ct. 685, 351 U. S. 131, 100 L. Ed. 1013, the dissenting opinions of Justices Black and Douglas seem to more accurately point out the law with respect to the rights of an accused in affording an accused due process of law, and the fact that Section 7207 must in fact be a lesser included offense than Section 7201; and that thus, there was more than merely an erroneous sentence in this matter, but the entire judgment of conviction was erroneous and void.

As a matter of fact, something of this nature must have been in the jury's mind when, after deliberating for some time, a note was sent to the court asking if the jury could "recommend," and the following colloquy was had between the court and the foreman of the jury:

> "[The Court]: Do you wish to do that, Mr. Foreman? What was meant by could the jury recommend? What did the jury have in mind, or what did you desire the Court to comment on?
>
> "The Foreman: Well, naturally, these jurors are of different minds, and we felt that perhaps there were some extenuating circumstances and the jurors were deliberating the point, and they wanted to know if they are permitted to make a different recommendation than is shown on the sheet that was delivered to us . . ." [The Verdict sheet] [Tr. Vol. XI, p. 2101, line 19, to p. 2102, line 2.][4]

B. The Supplemental and Coercive Charge Given to the Jury.

The jury retired for their deliberations at 4:42 P.M., October 27, 1960. After eight hours of deliberation until 12:45 A.M., October 28, 1960, the Court

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[4]There is certainly a great deal of room and reason to suppose that more or clearer evidence was available or could be produced on behalf of petitioner.

The record establishes that the petitioner did not have the slightest conception of how to protect his rights in a criminal proceeding. The fact that petitioner did not register twenty objections during the entire four week period is discussed by the trial court in the opinion (App. A pp. 25-33).

The witnesses called by petitioner to produce "evidence" to refute the charges were either government witnesses already called by the prosecution or character witnesses.

was convened on receiving a message from the jury that it wished additional evidence. [Tr. Vol. XI, p. 2088.] At 12:58, another message was received indicating that the jury wished to adjourn, and the jury retired at 1:12 A.M. [Tr. Vol. XI, p. 2094.] At 10:00 A.M. that morning, the Court reviewed various requests with the jury including the one discussed in Point A, *supra*, and the following occurred [Tr. Vol. XI, p. 2102, line 24, to p. 2104, line 24]:

"The Court: At this time the Court will give to the jury one additional instruction:

Ladies and gentlemen of the jury, this is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiescence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial

or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

In conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obligated to ask you

that you again retire and the Court will wait for further message from you.

/Now, Mr. Clerk, you may hand to the jury the original instructions plus the one additional instruction."

It is respectfully submitted that this additional charge to the jury in considering the entire case including the erroneous charges and the obvious reluctance of the jury to convict the petitioner so unbalanced the case in favor of the prosecution that petitioner could not have had a fair trial.

In connection with this, petitioner will quote to the Court from the American Bar Association Journal March, 1962, Vol. 48, page 271 under a broad title of "What's New in the Law" the following article discussing this exact point:

"Criminal Procedure . . . supplemental charges

"A trial judge's supplemental charge to a jury, apparently designed to encourage the jury to reach a verdict, has been held too coercive by the Court of Appeals for the Fifth Circuit and a conviction has been reversed thereby.

"So-called 'Allen charges' or 'dynamite charges' have been approved by federal courts many times since the United States Supreme Court in 1896 in *Allen v. U. S.*, 164 U. S. 492, found no reversible error in the particular language of a supplemental charge then before it. In this case, however, the Court found the bounds of the Allen charge exceeded.

"The jury received the case at 5:20 P.M., was brought back fifteen minutes later for the judge to correct an error in the charge, returned again at 7:00 P.M. to request a clarification on conspiracy, was called back at 10:10 P.M. when the 'dynamite charge' was given, returned at 11:46 P.M. to be asked whether they wished to go to a hotel for the night, and brought in a guilty verdict about thirty minutes later. In the supplemental charge the judge told them that the case had been completely tried, that some jury would have to decide it, that they were as competent as any other jury, that it was the duty of every juror to consult with each other juror, that they should be able to reach a verdict by following the principles of law given them and recalling the evidence, and that it was 'no credit to a juror to stand out in a pure spirit of stubbornness because he has taken a position'. The defendant excepted to the supplemental charge.

"The Court ruled that the trial judge 'went too far . . . when [he] expressed the opinion that, if the jury remembered the evidence and heeded the charge of the court, it ought to be able to agree upon a verdict', and it declared that there was no authority for the trial court's opinion that it was not to the credit of a juror to be stubborn. Declaring that the Allen charge itself approaches the ultimate permissible limit for a supplemental charge, the Court said: 'We think that, under all of the circumstances of this case, the words added by the court to the conventional Allen charge threw the charge out of balance and beyond the permissible limits to which a court may go in its endeavor

to influence the jury towards the rendition of a verdict.'

"(*Powell v. U. S.*, United States Court of Appeals for the Fifth Circuit, December 8, 1961, Cameron, J.)

"About a month later the same Court refused to reverse a conviction in a case in which the trial judge had given a supplemental charge with as much if not more, 'dynamite' in it. The Court declined to act because the defendant had not taken an exception. It also refused to say that there was plain error under Rule 52 of the Federal Rules of Criminal Procedure.

"In a strong dissent, one judge contended that if there ever was plain error, this was it, and that the case ought to be viewed as if an exception had been taken. He deplored the increased use of this type of supplemental charge and said that the time had come to forbid it. 'Like the silver platter', he remarked, 'this is too dear to keep. The cost in fundamental fairness is too great.'

"(*Huffman v. U. S.*, United States Court of Appeals for the Fifth Circuit, January 11, 1962, Cameron, J.)"

See also:

Billeci v. United States, 87 App. D. C. 274; 184 F. 2d 394, 24 A. L. R. 2d 881;

Allen v. United States (9th Cir. 1951), 186 F. 2d 439; and compare *United States v. Furlong* (7th Cir. 1952), 194 F. 2d 1.

In our case the trial court rejected the contention that the supplemental charge was erroneous on the

grounds that this petitioner had waived his objection because the court specifically inquired of petitioner whether he had any objection to the instructions and the petitioner responded in the negative. (Opinion, Appendix "A" to Petition for Writ of Certiorari, pp. 60-63.) The record reveals, however, that the court inquired as to whether there was any objection to the instruction *after it had been given and after the jury had retired.* [Tr. Vol. XI, p. 2105.]

Conclusion.

As was pointed out in the original Petition for Writ of Certiorari, petitioner herein appeared *pro se* throughout a complicated tax proceeding. His reasons were unusual: that the cost of an attorney was prohibitive and he thought he was innocent.[5] Assuming without admitting that this was a valid waiver of counsel, it is respectfully submitted that the lack of counsel did not give a license to the government to run roughshod over petitioner's constitutional right to a fair trial.

Each and every error submitted to the Court on this Petition for Rehearing and in the Petition for Writ of Certiorari constitutes in itself a reversible error. To discuss the evidence of the case and the fact that the entire conviction was sustained upon opinion evidence of government "experts" is redundant.

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[5]When the defendant was arguing to the jury [Vol. XI, pp. 1982-1983], he argued, though erroneously, that he would have to pay attorneys a retainer of $25,000.00, and that the total fee would cost as much as one-half million dollars, and that he would have to earn approximately $3,000,000.00 to pay attorneys in this suit. Although, to most persons, $500,000.00 might seem a large sum to pay for attorney's fees, the Court was unsympathetic.

"Now that is just too bad. Attorneys generally charge fees." [P. 1983, lines 4-5.]

Since 1896, when this Court put its stamp of approval on the so-called "Allen charge", the federal courts and the individual justices have disagreed as to its meaning and effect as illustrated by the comment in the American Bar Association Journal as late as January, 1962, the discord and misunderstanding still exists. There is a need for this Court to resolve and settle the conflicts revolving around this important question of law.

Petitioner respectfully requests this Honorable Court review its decision, denying the Petition for Certiorari and to grant the Petition so that petitioner may have due process of law afforded him according to our concept of justice.

Respectfully submitted,

GRUBIC, DRENDEL & BRADLEY
BURTON MARKS,
By BURTON MARKS,
Attorneys for Petitioner.

Certificate of Counsel.

Burton Marks, being one of the counsel for petitioner herein, certifies to this Court that the Petition for Rehearing is presented in good faith and not for the purposes of delay. Counsel further certifies to this Court that the Petition is restricted to the grounds specified in the Petition for Rehearing, to wit, other substantial grounds available to the petitioner which were not previously presented to this Court.

Dated: April 3, 1962.

BURTON MARKS.